COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Rulemaking to Revise Standards of Conduct Governing the Relationship Between Gas and Electric Distribution Companies and Their Unregulated Marketing Affiliates to Include All Affiliates	)	DPU - 97-96

COMMENTS OF ALLENERGY MARKETING COMPANY, L.L.C. REGARDING THE REVISION OF STANDARDS OF CONDUCT.

I. Introduction

AllEnergy Marketing Company, L.L.C. ("AllEnergy" or the "Company") hereby submits comments in the above-referenced proceeding. On October 17, 1997, the Department of Public Utilities, now the Department of Telecommunications and Energy, ("Department") commenced this rulemaking ("Order" or "DPU 97-96") to consider whether to expand the scope of 220 C.M.R. 12.00 et. seq. to include all affiliates of gas and electric distribution companies. Initial comments were due by November 25, 1997, and a public hearing was held on December 8, 1997. While AllEnergy has not previously been a party to these proceedings, comments submitted by other parties cannot be left unchallenged. Therefore, AllEnergy submits these final comments in response to specific issues raised by other commentors.

The Department's existing standards of conduct, codified at 220 C.M.R. 12.00 et. seq., regulating the relationship between distribution companies and their competitive affiliates apply to the relationship between Massachusetts Electric Company and AllEnergy. AllEnergy recognizes that the standards of conduct are intended to protect against the unlawful

transfer of monopoly power from regulated companies to their competitive affiliates and supports the standards of conduct as they currently exist. AllEnergy believes that it is only necessary to extend appropriate standards of conduct to relationships between non-energy affiliates and gas or electric utility distribution companies to the extent required to protect against such unlawful transfer of monopoly power.

II. The Use of Shareholder Assets to Promote the Business of an Affiliate Is Not Cross Subsidization or the Unlawful Transfer of Monopoly Power

Three commentors suggest that the use of a utility distribution company name or logo by an affiliate constitutes either cross subsidization or the unlawful transfer of market power and propose restrictions on the use of a distribution company's name or logo by an affiliated company. Such restrictions would raise constitutional questions regarding due process and taking of property without just compensation because the goodwill associated with the company name or logo is an asset of the shareholders.

The name and logo of a utility distribution company are part of that company's goodwill. Promotional advertising plays a major role in the overall image associated with a name or logo. Costs of institutional or image based advertising may only be included in rates if they benefit ratepayers directly. Boston Gas Co. v. Department of Public Utilities, 539 N.E.2d 1001, 405 Mass. 115 (1989). A utility distribution company is prohibited from including the cost of promotional advertising in its rates. M.G.L. c.164 ?33A. The only such costs permitted for inclusion in the rates are costs for property or service that are used or useful in the provision of utility service. New England Telegraph and Telephone Co. v. Department of Public Utilities, 97 N.E.2d 509, 321 Mass. 81 (1951) Advertising is only used or useful when it benefits ratepayers, such as advertising designed to compare the benefits of electricity or gas with other energy sources. M.G.L. c.164 ?33A. Advertising that benefits the company's

image is not used or useful in the provision of utility service and cannot be included in the rates. Therefore, the utility distribution company's goodwill, including its name and logo, are assets of the shareholders and should be allowed to be used for their benefit.

The Minnesota Supreme Court has recognized that use by a non-jurisdictional affiliate of the logo or company name of an affiliated utility distribution company does not result in cross subsidization because the ratepayers did not bear the cost of creating the goodwill. Minnegasco, a Division of NorAm Energy Corp., f/k/a Minnegasco, a division of Arkla, Inc., petitioner v. Minnesota Public Utilities Commission, 509 N.W.2d 904, 909 (1996). The court reasoned that "while ratepayers are involved in building a gas utility's goodwill when they purchase utility service.... [they] are no different in that regard than any customer who purchases a product from a business". Id. at. This holding accords with Justice Marshall's first footnote to his concurring opinion in Pacific Gas and Electric v. Public Utilities Commission of California, et al., 475 U.S. 1, 22 (1986), in which he argues "a consumer who purchases food in a grocery store is 'paying' for the store's rent, heat, electricity, wages, etc., but no one would seriously argue that the consumer thereby acquires a property interest in the store."

In its initial comments Enron Energy Services (?Enron?) suggests that use of any affiliate's name and logo raises market power concerns Comments of Enron Energy Services Regarding Revising Standards of Conduct, p.8. It says that there is a value in the utility distribution company's name which would benefit the affiliate. It does not follow, however, that the affiliate would accumulate excessive market power as a result of using the utility's name or logo. Every company looking to compete in the unregulated gas and electric markets will have advantages and disadvantages. Many companies will be well financed, national companies with the ability to advertise and enhance already significant brand identity.

By limiting the use of a logo or name of Massachusetts utility distribution companies, the Department would be protecting competitors that are not affiliated with Massachusetts utility distribution companies at the expense of competition. [1]

As evidence supporting its position, Enron cites a recent advertisement by Eastern Enterprises, the parent company of Boston Gas and a former parent of AllEnergy (Eastern has since divested itself of its interest in AllEnergy). The Eastern advertisement clearly stated that Eastern will ?lead Massachusetts to a deregulated energy market through our efforts at Boston Gas and AllEnergy Marketing Company.? Enron misstates the advertisement as saying "Boston Gas together with AllEnergy will 'lead Massachusetts to a deregulated energy market.'" See Comments of Enron, p. 10. These statements have different meanings. In the advertisement it is clear that the parent company was participating in the deregulation of energy markets, while Enron?s restatement of the advertisement suggests that the local distribution company in concert with its competitive affiliate was leading the way to deregulation. The text of the advertisement from which Enron draws its quote clearly indicates that the advertisement is designed to educate readers about Eastern Enterprises. It is also our understanding that the advertisement was paid for by Eastern Enterprises' shareholders.

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[1] The use of a corporate name and logo has been raised by Enron Energy Services (Enron) and Green Mountain Energy Resources (Green Mountain). These parties to this proceeding advocate restrictions on use of the corporate name and logo by any competitive affiliate of a local distribution company, yet they both derive their corporate names from their parent or affiliate (Enron Corp. and Green Mountain Power Corp., respectively) without offering to undergo the same restriction they advocate for others. Enron is one of over 79 affiliates employing the Enron name; Green Mountain is part of a diversification plan into unregulated businesses that complements Green Mountain Power's basic utility operations. New Energy Ventures commented in this proceeding that utilities should be prohibited from developing unregulated or even potentially competitive activities. Yet Tucson Electric Power, a 50% owner of New Energy Ventures, has testified before the Arizona Commission that "the holding company structure is the best structure for the changing utility industry". The Department should not allow parties such as Enron, Green Mountain, New Energy Ventures and their parents to have it both ways. Rather, the Department should continue to allow the marketing affiliates of Massachusetts distribution companies to use their corporate logos.

New Energy Ventures, East (?NEV East?) suggests that Massachusetts look to California for direction on how best to regulate affiliate standards of conduct

Comments of NEV East, at p.3. Green Mountain Energy Resources L.L.C. ("Green Mountain") also cites the California proceedings Comments of Green Mountain Energy Resources, p.2. At the time of both companies' comments, an Administrative Law Judge ("ALJ") had recently published a draft decision and two commissioners, Commissioners Jessie Knight and Richard Bilas, jointly filed alternative pages to the draft decision of the ALJ. Both NEV East and Green Mountain cite the alternative proposal to support their arguments that affiliates be prevented from using the name or logo of an affiliated utility. On December 16, 1997, the California Public Utilities Commission voted to accept affiliate standards of conduct which permit marketing affiliates to use a utility distribution company's name or logo, including the two commissioners who proposed a more restrictive alternative. An article appearing in Gas Daily states that :

"Commissioner Knight yesterday defended his abandonment of his alternate order by saying that further dialogue with parties, customers, ALJ Janet Econome and the CPUC staff had led him to believe that being overly restrictive on affiliates would lead to fewer competitive choices and was not in the best interest of customers. Knight also noted that for the remainder of his tenure at the commission, he would be very vigilant that investor-owned utilities not take undue advantage of the market."

Gas Daily, Fax Edition, Wednesday, December 17, 1997, p.6.

Similarly, The Department should impose no restrictions on the use of a parent company's name or logo by a competitive affiliate where the parent is not a utility distribution company because the parent company's identity, name, logo and goodwill are all property of the shareholders.

III. Availability of Customer Information

The Department asked specifically "(a) whether 220 CMR 12.03 (9) should be revised to allow for the release of proprietary customer information with other than prior written authorization of the customer and, if so, what the conditions should be for such release."

AllEnergy agrees with Enron that competitive suppliers should be permitted to obtain customer information from distribution companies by means other than written authorization. Enron Comments, pp. 12-13. The requirement that customers submit written authorization to distribution companies will pose an unnecessary burden on suppliers that will inhibit competition. NEV's position on the same issue appears to be merely intended to disadvantage affiliates of Massachusetts utility distribution companies. NEV East Comments, pp. 4-5. The current standards adequately address any concerns raised by NEV. The suggestions that affiliate "requests of information from a parent, whether proprietary or not, be sent to a non-affiliate at the same time; [and] the fact that the request was made should also be posted", are preposterous. Such a rule would require the posting and dissemination of requests for information about the location and time of parent company sponsored events and would not further policy objectives of the Department. The position advanced by Enron is far more likely to protect consumers and promote competition and we support the adoption of their suggested language.

IV. Conclusion

The use of the corporate identity and goodwill of a Massachusetts utility distribution company or of a parent company by an affiliated company is appropriate, necessary and provides no undue advantage. The use of such identities and goodwill will permit companies affiliated with Massachusetts utility distribution companies to compete with well recognized national companies which will benefit all consumers. The Department should not, therefore, expand the substantive scope of the current standards to restrict the use of the name or logo of Massachusetts utility distribution companies or their parents.

Also, the Department should not impose burdens on consumers who wish to change their electricity supplier. The requirement that written authorization be obtained prior to the disclosure of certain information is such a burden.

Any standards promulgated by the Department should only be intended to protect consumers, not competitors.

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